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SUPREME COURT OF THE UNITED STATES

LLOYD A. FRY ROOFING COMPANY ..... *Petitioner*

v. No. 37, October Term, 1952

SCOTT WOOD, ET AL, individually and as members of and composing the ARKANSAS PUBLIC SERVICE COMMISSION ..... *Respondents*

BRIEF FILED ON BEHALF OF RESPONDENTS

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STATEMENT

In the fall of 1949 Fry Roofing Company, petitioner, adopted a plan for the transportation of its products which involved a successive leasing arrangement between certain individual owners of vehicles to a man named Whittington, who in turn leased the vehicles to Fry Roofing Company, which company then employed the owner of the vehicle as its driver. Payment for truck and driver was based upon a mileage rate. Neither petitioner, the driver-owner, nor Whittington held or applied for a permit to operate motor vehicles as a carrier of goods over the highways of the State of Arkansas (R.32). The respondent, the Arkansas Public Service Commission, acting in its official capacity as an agency of the State of Arkansas, and in compliance with the duties imposed upon it by Section 6 of the Arkansas Motor Carrier Act, Act 367 of the Acts of Arkansas, 1941, began an investigation of the method of operation being used for the transportation of petitioner's products. Enforcement officials of the department stopped several trucks being operated by the driver-owners under the lease agreements and attempted to ascertain from them the details of this method of operation. They determined that the driver claimed

to be the owner of the truck and also an employee of petitioner. They were unable to obtain a copy of the lease between the driver-owner and Whittington although each driver had a copy of the lease between Whittington and Fry (R.143). The respondent, after giving the matter study and in accordance with the conference ruling in case No. R-461 entered May 11, 1949 (R.199), concluded that the successive lease arrangement was a mere subterfuge to evade proper compliance with the provisions of the Arkansas Motor Carrier Act. It directed its enforcement officers to arrest several of the driver-owners for failure to comply with the Arkansas Motor Carrier Act so that the matter could be tested. Several arrests were made in accordance with these instructions. On January 26, 1950, a conference was held between the general traffic manager of the petitioner, two enforcement officers of the Arkansas Public Service Commission, a representative of Whittington, and the district director of the Interstate Commerce Commission (R.144). This conference was held at the offices of the Public Service Commission and with the members thereof. At this conference it was revealed that petitioner was introducing this plan in all of its plants in various parts of the United States (R.159). It was there agreed that Whittington would restrict his transportation for Fry in the State of Arkansas to vehicles that were then owned by Wittington until the validity of petitioner's plan of operation could be passed upon by the courts (R.180). (Subsequent events proved that this agreement was violated by Whittington who later refused to enter openly into the State of Arkansas except upon a promise of immunity from the law enforcement officials of the State, with the possible exception of one conference in West Memphis at which he promised to return to West Memphis, Arkansas, the following day if he were not arrested and which promise

he also violated.) In the conference of January 26th the respondents were given a copy of the lease agreement between the driver-owners of the trucks and Whittington and also a copy of the lease between Whittington and petitioner. This was the first time that respondents had been successful in obtaining copies of the leases. After investigation respondents concluded that the driver-owners were actually contract carriers under the definition of the Arkansas Motor Carrier Act, Sec. 5, and so informed the parties. Petitioner insisted upon continuing its method of operation notwithstanding. Thereafter arrests were made when violations of the law were found. The details of these arrests are contained in the record. Action was instituted by petitioner in the Chancery Court of Pulaski County to restrain and enjoin the respondents individually and as the Arkansas Public Service Commission, their servants, agents and employees, from arresting or molesting the driver-owners or employees of petitioner. This injunction was dissolved upon stipulation so as to allow arrests for violations of safety and local laws. Upon hearing the Chancery Court found that the driver-owners were employees of petitioner and that the entire arrangement constituted private carriage. Upon appeal the Supreme Court of Arkansas reversed the decision of the lower court finding that the driver-owners were contract carriers under the definitions as contained in Sec. 5(a)(8) and that the sucessive lease agreements were a subterfuge in order to evade compliance with the Arkansas Motor Carrier Act (R.225). Thereafter, certiorari was granted by this Honorable Court (R.224).

ARGUMENT

The Arkansas Supreme Court Correctly Held that the Driver-Owners Were in Fact Contract Carriers Under the Arkansas Statutes

The Arkansas Motor Carrier's Act, Act 367 of 1941 defines a contract carrier as follows:

> "The term 'contract carrier by motor vehicle' means any person, not a common carrier included under Paragraph 7, Section 5(a) of this Act, who or which, under individual contracts or agreements, and whether directly or indirectly or by a lease of equipment or franchise rights, or any other arrangement, transports passengers or property by motor vehicle for compensation." Arkansas Statutes, 1947, 73-1705(8).

It is necessary to read the two leases, that is, leases from the driver-owners to Whittington and the lease from Whittington to petitioner, together in order to ascertain the true intent of the parties and the reality of the transaction. Both leases must be examined in relation to each other so that the practical effect of the entire transaction can be discovered. Petitioner has asserted repeatedly that the trucks were in the "entire control" of petitioner. The very wording of the two leases, however, negatives that contention. We think it proper to call the attention of the Court at this time to the change in the lease agreement made by Whittington sometime after the conference between the parties on January 25, 1950. In the original lease (R.27), which was presented to respondents at the conference, there was a requirement that the lessor or driver owner, as we choose to describe him, must obtain and keep employment with petitioner. After the conference this form of lease was changed so as to eliminate this

particular paragraph. The new form of lease (R.34) does not contain a provision requiring employment of the lessor and it also changed the cancellation notice from five to thirty days. Respondents were not notified or informed of this change until the trial of this case in the lower court. In all other respects the leases between Whittington and the driver-owners seem to be identical.

In the lease between the driver-owner and Whittington, the driver-owner agrees (1) to equip and maintain the tractor and supply the same with fifth wheel, extra gas tank and all required service equipment, (2) maintain the truck and tractor in good and efficient working order, (3) to pay all costs of operation of the tractor including, but not limited to gasoline, oil, tires, replace parts and repairs and all necessary licenses, road mileage taxes and registration fees, (4) to paint the truck and tractor in the color and manner and with the insigna or names desigated by Whittington, (5) to keep the truck and tractor washed, cleaned and polished during the term of the agreement, (6) to have in effect at all times fire, theft and collision insurance. Whittington agrees to pay as rental for the equipment as furnished by the driver-owner, the sum of 9c per mile for all miles operated.

In the Whittington-Fry Leasing Agreement, Whittington agrees to provide (1) garage service including washing, polishing, oiling, greasing, inspection and storage, (2) all licenses, (3) all maintenance and repairs, (4) all fuel oil etc., (5) painting and labeling, (6) tires and tubes, and extra tires, (7) insurance against fire, theft, tornado and wind storm. Fry agrees to pay Whittington the sum of 15½c per mile for the equipment. Fry employs the driver who is the original owner of the truck for the sum of 5c per mile. As found by the Arkansas Supreme Court the net result is that the owner of a truck

furnishes the truck and the driver with all the services to Fry to transport Fry's properties for the sum of 20½c per mile. Fry is receiving a completely furnished serviced and maintained truck with driver which it uses to transport its products for sale. It is difficult for respondent to perceive the distinction between this overall arrangement and other types of contract carriage. In all contract carriage, the shipper has the right to designate where the goods are to be taken and at what time. Consideration must also be given to the testimony of Whittington (R.32) that he was not leasing any trucks from individuals which were in turn leased to petitioner where the individual was not employed by petitioner as a driver. The position of the respondents in this matter is simply that they consider the arrangement devised by petitioners to be a device, ingenious though it may be, created for the sole purpose of allowing petitioner to gain the advantage of private carriage of commodities without assuming the burdens and hazards of that type of carriage; that petitioner by such arrangement is shipping its goods over the highways of Arkansas in vehicles operated by the owners thereof, which owners are actually contract carriers and who have not obtained permits from the State of Arkansas to operate as such contract carriers. Having reached this conlusion, the respondents must of necessity discharge the duties imposed upon them by the laws of Arkansas and the oath of their office by directing that those violating the law be arrested. This matter has been unusual in that the petitioner has, in the opinion of the Arkansas Public Service Commission, assiduously attempted to give to the officials of the State of Arkansas only that information which it wanted them to have. Its actions have been characterized by a complete indifference toward the rights of a sovereign state. The respondents have no desire and have had no desire to treat the petitioner in

any different manner than any other person or company which they conclude comes under their jurisdiction. The record will reflect that upon each occasion that an effort was made to test the legal position of the petitioner's plan, the petitioner's agents and employees failed to go forward in a test through appropriate channels. Respondents were faced with a situation wherein a company openly defied the authority of an arm of the State of Arkansas insisting upon pursuing its course of action notwithstanding it had been instructed not to do so until the legality of its plan had been submitted to the courts in an orderly democratic process. Having determined that petitioner's plan, as it was being operated, would constitute a violation of the Arkansas Satutes, the respondents were faced with the choice of either closing their eyes and allowing petitioner to continue its operations until the question had been decided by the courts, or demanding that petitioner cease its operation until the court had passed upon the question. Petitioner insisted that the A.P.S.C. bow to its asserted superior right to conduct its operation as it chose regardless of the official opinion of the A.P.S.C. It is small wonder when one reads the record in its entirety that the respondents looked upon petitioners action with some suspicion.

The Supreme Court of Arkansas has found from a careful study of the evidence presented that the plan of petitioner was a mere device to avoid the statutes of Arkansas. The dissenting opinion is ample proof that the Court considered very carefully the factual questions presented and by a majority of five to two reached this decision. The Arkansas Supreme Court cited as authority for its finding the following cases:

Georgia Truck System v. *Interstate Commerce Commission*, 123 Fed. 2d 210;

Interstate Commerce Commission v. *F. and F. Truck Leasing Co.*, 78 Fed. Supplement 13;

U. S. v. *LaTuff Transfer Service*, 95 Fed. Supplement 375.

Respondent respectfully submits that the decision of the Supreme Court of Arkansas, based upon conflicting evidence, should not be disturbed in the absence of clear and convincing error.

A State Does Not Burden Interstate Commerce by Requiring Contract Carriers to Obtain Permits to Use the Highways of the State

The record reflects quite clearly that there has been no application for permit for contract carriage by the driver-owners, nor has there been an application by Whittington for a permit to act as a broker. No question is involved in this case as to the resonableness of any regulation or any requirement for a permit. The respondents do not contend that they have a discretionary right to refuse to grant a permit for contract carriage where that carriage is in interstate commerce. Respondents have imposed no burdensome requirements or regulations upon any person applying for such permits, and the record is void of any such action by the Arkansas Public Service Commission. Any fears of burdensome requirements or regulations are without foundation. Respondents assert simply that one who uses the highways of the State of Arkansas for profit, whether he be in interstate or intrastate commerce, may validly be required to register with the appropriate agency of the State of Arkansas and to obey its police requirements and such rules and regulations as the welfare and safety of the people of Arkansas require, based always, however, upon a safeguard of the constitutional guaranties of not only the citizens of this

state, but the citizens of all states. This Court has many times held that such power rests with the state.

Bradley v. *Public Utilities Commission*, 289 U. S. 92, 77 L.ed. 1053;

Columbia Terminals Co. v. *Lamber, et al.*, 84 L.ed. 983, 309 U.S. 620;

Frank Eicholz v. *Public Service Commission of the State of Mo.*, 306 U.S. 268, 83 L.ed. 641;

South Carolina State Highway Department v. *Barnwell Brothers, Inc., et al.*, 303 U.S. 177, 82 L.ed. 734;

Latta Truck Lines v. *Hargus*, 29 Fed. Supp. 53.

Respectfully submitted

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